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EASTMAN KODAK COMPANY,

Petitioner,

v.

IMAGE TECHNICAL SERVICES, INC., *et al.*,

Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF
NATIONAL RETAIL FEDERATION,
[illegible] IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Did the Court of Appeals for the Ninth Circuit correctly hold that summary judgment by the District Court, in the absence of a full exposition of the factual issues concerning "market power" in the interbrand product market and its relationship to alleged antitrust violations in the parts and service markets, was improperly granted?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1029

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BRIEF OF NATIONAL RETAIL FEDERATION, AS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

This brief is respectfully submitted on behalf of the National Retail Federation ("NRF") as *amicus curiae*. Pursuant to Rule 37.3 of the rules of this Court, NRF has obtained and filed the written consent of each of the parties to the filing of this brief. NRF supports the position of the Respondents in this case and requests that the decision below be affirmed.

INTEREST OF AMICUS CURIAE

The National Retail Federation is the largest national trade group which speaks for the retail industry. The organization

represents the entire spectrum of retailing, including some twenty-seven national retail associations and fifty state retail associations. NRF's membership represents an industry that encompasses over one million U.S. retail establishments.

As a representative of such a large number of retail establishments, NRF is naturally interested in any litigation involving retail business. Many members of NRF provide replacement parts and service for products sold to their customers as an alternative to manufacturer-owned or authorized service centers. In some rural and isolated areas of the country, repair and parts service offered by these retailers is the only practical alternative for all but the largest customers.

A decision in this case that would establish a universally applicable rule of law favoring total manufacturer control of parts and service for its products, without a full exposition of the pertinent facts at trial, would have widespread damaging effect on the entire parts and service industry, including parts and service offered by retail members of NRF to their customers.

STATUTORY PROVISIONS INVOLVED

The Sherman Act, 15 U.S.C. §§ 1 and 2, provides:

§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

Petitioner, Eastman Kodak Company ("Kodak"), manufactures and sells copiers and micrographic equipment. It also sells service and replacement parts for its machines. Respondents are independent service organizations ("ISOs").

In the early 1980s, ISOs began buying parts from Kodak and competing with it in servicing Kodak machines, sometimes offering significantly lower prices.

In 1985 and 1986 Kodak implemented a policy of selling replacement parts for new micrographic machines only to buyers of Kodak machines who do not purchase repair services from ISOs. Kodak also has a policy of not selling copier parts to ISOs.

Kodak contends that these policies are intended to ensure quality of service for Kodak machines, to reduce its parts inventories and inventory costs and prevent ISOs from free-riding on Kodak's investments.

In 1987, a number of ISOs brought this action, alleging that Kodak had unlawfully tied the sale and service of Kodak

machines to the sale of parts and had unlawfully attempted to monopolize the sale of service for Kodak machines in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

After abbreviated discovery, the District Court granted summary judgment for Kodak, upon finding no evidence of a tying arrangement and finding that Kodak, without monopoly power in the equipment market, had a natural monopoly over the parts it sells under its name.

The 9th Circuit reversed this decision and remanded the case for trial. It held that an unlawful tying agreement could exist if Kodak had sufficient economic power in the tying market.

The Circuit Court held that there were genuine issues of fact concerning the questions of market power and market definition to preclude summary judgment.

The Court of Appeals also found evidence to support a finding that Kodak's implementation of its parts policy was anticompetitive and exclusionary and, therefore, sufficient to withstand summary judgment on the monopoly claim.

The Petitioner filed a Petition for a Writ of Certiorari in this Court. On June 17, 1991, this Court agreed to hear Petitioner's appeal.

SUMMARY OF THE ARGUMENT

The Petitioner and its *amicus* supporters are incorrect in asserting that, on the basis of the very limited facts presented in this case, it can be determined on summary judgment that Petitioner lacks the market power necessary to establish violations of sections 1 and 2 of the Sherman Act. Petitioner is also incorrect in asserting that if it does lack market power in the interbrand product market, it necessarily cannot have

violated either section 1 or 2 of the Sherman Act in any aftermarket (such as parts and service which are the subject of this case). Furthermore, an affirmation of the District Court's summary judgment in this case on a bare bones record, supported by questionable legal inferences derived from questionable economic assumptions, would establish legal principles for the entire product service industry which could have a truly devastating effect on the ability of independent service organizations, in all fields including retailing, to compete for replacement parts and service business. This would only result in higher prices for consumers.

ARGUMENT

I. THE GRANT OF SUMMARY JUDGMENT IN THIS CASE WAS PREMATURE. THE PETITIONER'S POSITION ON SUMMARY JUDGMENT DEPENDS ON A NUMBER OF ECONOMIC ASSUMPTIONS WHICH REQUIRE EVIDENTIARY SUPPORT.

Although much time has passed since this Court expressed its skepticism about granting summary judgments in antitrust cases, *Poller vs. Columbia Broadcasting System*, (368 U.S. 464 (1962), summary judgment still may not be granted where genuine issues of fact remain to be resolved. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) did not decide otherwise. In that action, after years of discovery and the production of millions of documents, summary judgment was entered when plaintiffs were unable to produce any direct evidence of the alleged predatory pricing conspiracy. The favorable inferences Plaintiff attempted to draw from that extensive record were found by this Court to be implausible "as a matter of common observation." *Id.* at

587. In this case, the Respondents were allowed only limited discovery and the inferences which they attempt to draw from the limited facts as outlined in their brief are no less "plausible" than the inferences sought to be drawn from the same facts by the Petitioner. All relevant facts to determine whether lack of market power in the interbrand product market precludes unlawful practices in the parts and service aftermarket, upon which the premise of Petitioner's argument rests, remain unexplored in this summary judgment decision.

Nothing in the *Matsushita* decision suggests that where plaintiffs, such as Respondents, produce evidence to suggest a violation, a court can substitute its own inference about the credibility of the evidence, in effect taking the case from a jury. See *In re Coordinated Pretrial Proceedings in Petroleum Products Litigation*, 906 F.2d 432, 438 (9th cir. 1990), *cert. denied*, 111 S. Ct. 2274 (1991). It is still the law that all factual doubts in determining a summary judgment motion must be resolved against the moving party, in this case the Petitioner, *United States v. Diebold*, 369 U.S. 654, 655 (1962), after development of an adequate record. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

The Ninth Circuit recognized that the propositions advanced by Petitioner, essentially without support in the record (i.e., that it does not possess market power in the interbrand product market, and that its alleged lack of market power in the interbrand product market *ipso facto* renders lawful any competitive activity in the parts and service aftermarket), could not properly be the basis of a summary judgment, in view of the fact that other facts cited by the Respondents point contrariwise. (For example, as pointed out by the Respondents, the markets for certain Kodak copier and micrographic equipment could be considered "highly concentrated." Also, the motivation of consumers in buying products in the interbrand market may not reflect a consideration of availability or costs

of parts and services. Information as to such availability or costs may not be known to customers at the time they purchase equipment.)

II. THERE WAS SUFFICIENT AMBIGUITY IN THE EVIDENCE OFFERED ON PETITIONER'S ECONOMIC POWER IN THE PARTS AND SERVICE AFTERMARKET TO PRECLUDE SUMMARY JUDGMENT.

Petitioner in attempting to reverse the decision of the Court of Appeals argues the principle that lack of market power in the interbrand product market precludes the possibility of unlawful tying or monopolization in the parts and service aftermarket. (The Solicitor General, in his *amicus* brief, appears to have altered that proposition to state that the non-existence of "monopoly power" in the product market precludes a tying or monopolization violation in aftermarkets.)

First of all, as stated above, there is an insufficient record in this case upon which to assume the non-existence of "market power" in the interbrand product market or aftermarket.

Secondly, the test for "market power" in a tying case is not the same, nor is as rigid, as that required to show "monopoly power." This Court made it clear in *Jefferson Parish Hospital District #2 v. Hyde*, 466 U.S. 2 (1984), that the "market power" needed to establish a *per se* tying claim can be supported by a showing of some unique characteristic that makes anti-competitive forcing likely. *Ibid*, pages 16-17. See also *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 502-503 (1969).

Even if the requisite "market power" (as distinguished from "monopoly power") is not possessed by Petitioner in the interbrand product market, the existence of "market power"

by Petitioner in the parts aftermarket could, under certain factual circumstances, be sufficient to establish a tying violation as to service. See *International Business Machines Corp. v. United States,* 298 U.S. 131 (1936). A number of consumer economic behavioral theories are cited in the *amicus* briefs of the state attorneys general, Public Citizen and others concerning the choice of a parts and service seller as opposed to the choice of product. These theories cast significant doubt on the proposition that lack of market power in the interbrand product market necessarily precludes unlawful tying or monopolization in the parts and service market and strongly suggests the need for a full examination of these issues at trial.

CONCLUSION

The Court of Appeals correctly decided that a finding of a broadly applicable law of *per se* legality permitting a manufacturer to completely control the sale and use of parts and services for its products, regardless of the means employed or their competitive effects, merely upon a showing of lack of "market power" in the interbrand product market, was not warranted without a full examination of the issues at trial. Summary judgment, based on a cryptic record from which dubious inferences are drawn, is no basis on which to establish a principle of law having widespread effect on consumers and the entire U.S. service industry, including many members of NRF which offer replacement parts or service to their customers.

Those who insist upon economic efficiency as the sole *raison d'etre* of the antitrust laws cite "consumer welfare" as the ultimate goal of the antitrust laws. An affirmance of the Court of Appeals in this case is required to ensure that the issues raised by this case are fully explored in light of their potential negative effect on the consumer welfare and the fast growing service industry.

For the reasons stated herein, the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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